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In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD W. VELDE, ET AL., PETITIONERS

v.

NATIONAL BLACK POLICE ASSOCIATION, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

NATIONAL BLACK POLICE ASSOCIATION, INC., ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTIONS PRESENTED

1. Whether federal officials are absolutely immune from personal damages liability for their decision not to initiate administrative action to terminate federal funding to local government agencies that allegedly engage in discriminatory personnel practices.

2. Whether petitioners' failure to terminate federal funding to local government agencies that allegedly discriminate on the basis of race and gender gives rise to a cause of action for damages under the Fifth Amendment.

3. Whether petitioners are entitled to qualified immunity as a matter of law.

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* The other parties to this case are petitioners Edward H. Levi, Charles R. Work, and Herbert C. Rice, and respondents Penelope Brace, Bruce Bailey, Kristen Heemstra, Ollie S. Glover, Joel Michelle Schumacher, Raymond Clark, Kent G. McKinney, Penny Orazetti, Roberta Ledyard, Robert Booth, William Harris, and Jennie McKinney.

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The Solicitor General, on behalf of Richard W. Velde, Edward H. Levi, Charles R. Work, and Herbert C. Rice, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-23a) is reported at 631 F.2d 784. The opinion of the district court (App. E, *infra*, 28a-29a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 24a-25a) was entered on May 14, 1980. A petition for rehearing was denied on August 1, 1980 (App. D, *infra*, 27a). On October 21, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to December 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 509 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 206, as reenacted by Section 2 of Pub. L. No. 93-83,

87 Stat. 211, codified at 42 U.S.C. (1970 ed., Supp. V) 3757, provided:

> Whenever the Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this chapter, finds that, with respect to any payments made or to be made under this chapter, there is a substantial failure to comply with—
>
> (a) the provisions of this chapter;
>
> (b) regulations promulgated by the Administration under this chapter; or
>
> (c) a plan or application submitted in accordance with the provisions of this chapter;
>
> the Administration shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made for activities in which there is such failure), until there is no longer such failure.

3. Section 518(c) of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 208, as amended by Section 2 of Pub. L. No. 93-83, 87 Stat. 214, codified at 42 U.S.C. (1970 ed., Supp. V) 3766(c), provided:

> (1) No person in any State shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter.
>
> (2) Whenever the Administration determines that a State government or any unit of general local government has failed to comply with para-

graph (1) of this subsection or an applicable regulation, it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise the powers and functions provided in section 3757 of this title, and is authorized concurrently with such exercise—

(A) to institute an appropriate civil action;

(B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (section 2000d of this title); or

(C) to take such other action as may be provided by law.

(3) Whenever the Attorney General has reason to believe that a State government or unit of local government is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.

STATEMENT

1. In 1968, Congress created the Law Enforcement Assistance Administration ("LEAA") in order to provide technical and financial assistance to local and state police departments. See Title I of the Omnibus Crime Control and Safe Streets Act of 1968 ("the Act"), Pub. L. No. 90-351, 82 Stat. 197-209, codified at 42 U.S.C. 3701 *et seq.*[1] The Act authorizes the

[1] In 1979, Congress restructured LEAA, creating a National Institute of Justice, a Bureau of Justice Statistics and

Administrator to make financial grants to state and local agencies in order to establish state and regional law enforcement planning agencies, to develop and acquire law enforcement equipment and methods, and to recruit and train law enforcement personnel. See 42 U.S.C. 3722-3725, 3731-3750. Pursuant to these provisions, LEAA distributed approximately $7.25 billion in federal funds to state and local agencies between 1969 and 1979. Such funds represent only a small percentage of the operating budget of any recipient police department.[2]

Section 518(c)(1) of the Act prohibits any recipient of LEAA funds from discriminating on the basis of "race, color, national origin, or sex." 42 U.S.C. (1970 ed., Supp. V) 3766(c)(1). At all times relevant to this litigation, Section 518(c)(2) provided that upon determining that a recipient of funds is discriminating or otherwise failing to comply with LEAA's regulations, LEAA "shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance." 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2).[3] Section

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an Office of Justice Assistance, Research, and Statistics. See Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167. These changes do not affect the legal issues presented by this case.

[2] For example, in 1974, the Philadelphia Police Department, which is discussed in respondent's complaint (C.A. App. 19-21), received a total of less than $800,000 in LEAA grants. The Department's total budget that year was almost $132 million. Thus, LEAA's grants accounted for approximately 0.6% of the 1974 Philadelphia Police Department's budget. ("C.A. App." refers to the appendix filed in the court of appeals.)

[3] In 1976, Section 518 was substantially amended. See Crime Control Act of 1976, Pub. L. No. 94-503, Section 122(b), 90 Stat. 2418. See also page 16, *infra*.

518(c)(2) further stated that "[i]f within a reasonable time" LEAA cannot secure voluntary compliance, it "shall exercise the powers and functions provided in section [509]." 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2).[4] Section 509, in turn, provided that if, after notice and an opportunity for a hearing, LEAA finds that "there is a substantial failure to comply," it "shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made for activities in which there is such failure), until there is no longer such failure." 42 U.S.C. (1970 ed., Supp. V) 3757.[5]

2. In 1975, respondents, six blacks and six women and an organization that represents black police officers, filed this suit in the United States District Court for the District of Columbia, challenging LEAA's funding of state and local police departments that allegedly discriminate on the basis of race and gender. Named as defendants were the Department of Justice, LEAA, and four Department of Justice officials ("petitioners"), Attorney General Edward H. Levi, LEAA Administrator Richard W. Velde, LEAA Deputy Administrator Charles R. Work, and Director of LEAA Office of Civil Rights Compliance Herbert C. Rice, who were sued in their individual and official capacities.

Respondents alleged that state and local police departments that had received and were receiving LEAA grants had discriminated against them. Respondents further claimed that petitioners' failure to terminate funding to these discriminatory agencies

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[4] Section 518(c)(2) also authorized LEAA to institute other appropriate proceedings to remedy the noncompliance.

[5] Section 509 was also amended in 1976. See Crime Control Act of 1976, Pub. L. No. 94-503, Section 122(a), 90 Stat. 2418.

in accordance with Sections 509 and 518 of the Act violated their statutory and constitutional rights by "serv[ing] to finance and thus to perpetuate the discriminatory and exclusionary employment practices of LEAA recipients" (Complaint ¶ 41(b), reprinted at C.A. App. 19). Respondents sought injunctive and declaratory relief from LEAA and the Department of Justice and $20 million in compensatory and punitive damages from petitioners.

The government moved to dismiss the case or, in the alternative, for a grant of summary judgment. In particular, petitioners contended that respondents lacked standing to challenge the refusal to terminate federal funding and that respondents' complaint failed to state a claim upon which relief could be granted. Petitioners further argued that they enjoyed official immunity with regard to respondents' claim for damages.[6] On December 8, 1976, the district court dismissed the complaint, relying on *Barr* v. *Matteo*, 360 U.S. 564 (1959). The court stated that petitioners' "challenged actions * * * clearly fall within the outer perimeter of the line of their official duties * * * [and that c]onsequently [respondents'] claims for monetary damages against the defendants in their individual capacities are barred by the doctrine of official immunity" (App. E, *infra*, 28a-29a).[7]

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[6] The government also claimed that the Crime Control Act of 1976, Pub. L. No. 94-503, Section 122, 90 Stat. 2418, had rendered respondents' claims for injunctive and declaratory relief moot. The district court agreed (App. E, *infra*, 28a-29a), but the court of appeals reversed on this point (App. A, *infra*, 3a-4a, 8a). These claims are not before this Court.

[7] The record shows that petitioners had very different roles and responsibilities regarding LEAA funding. Petitioner Levi was not involved in the day-to-day decisions regarding LEAA funding, although he did have general authority over LEAA. Moreover, several employment discrimination suits were ini-

On appeal, a divided court of appeals reversed. The court recognized that in *Butz* v. *Economou*, 438 U.S. 478, 508-517 (1978), this Court established that administrative officials who perform prosecutorial functions are absolutely immune from personal damages liability (App. A, *infra*, 5a). The court of appeals concluded, however, that petitioners "have virtually no discretion under the relevant statute in deciding whether to terminate LEAA funding of discriminatory recipients" (*id.* at 6a). Because, in the court's view, "[t]he minimal matters left to LEAA's judgment * * * do not rise to the level of prosecutorial discretion that is protected by absolute immunity" (*ibid.*), petitioners are merely entitled to a qualified immunity with regard to their decision not to terminate LEAA funding (*id.* at 6a-7a). Declining to address petitioner's claim that in any event the record before the district court had established

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tiated against major police departments while he was Attorney General (C.A. App. 199-229). Similarly, although he delegated most responsibility for civil rights compliance to the Director of the Office of Civil Rights Compliance, petitioner Velde engaged in several attempts to secure voluntary compliance and initiated and participated in various programs designed to increase civil rights compliance and awareness among LEAA funding recipients (*id.* at 190-196, 624-720). Petitioner Work's only contact with LEAA's civil rights compliance efforts concerned his promulgation of regulations prohibiting discrimination and his role in aiding respondent Brace in her suit against the Philadelphia Police Department (*id.* at 233-235). Finally, petitioner Rice had primary responsibility for promulgating and enforcing LEAA's civil rights regulations and guidelines, and he exercised broad discretion in allocating prosecutorial resources and in choosing appropriate methods to effectuate LEAA's civil rights compliance program (*id.* at 243-245).

their entitlement to a qualified immunity, the court of appeals remanded for trial.[8]

Judge Tamm dissented on the grounds that petitioners are entitled to absolute immunity. Judge Tamm observed that the absolute immunity recognized in *Economou* for officials who initiate administrative proceedings must apply as well to those who decline to move forward with such proceedings (App. A, *infra*, 16a-17a). Otherwise, he explained, the existence of a one-sided immunity would create an unwarranted and improper bias in favor of prosecution (*ibid.*). Judge Tamm further concluded that petitioners' decisions to seek voluntary compliance rather than to initiate fund termination proceedings are "exactly what the Supreme Court had in mind when it spoke of functions 'analogous to those of a prosecutor' " (*id.* at 17a, quoting *Butz* v. *Economou*, *supra*, 438 U.S. at 515).

In addition, Judge Tamm disagreed with the majority's conclusion that petitioners lacked discretion regarding fund terminations under Sections 509 and 518 of the Act (App. A, *infra*, 17a-20a). Noting that Congress had amended those provisions in 1976 precisely because it believed that LEAA had too much discretion (*id.* at 20a), Judge Tamm pointed out that the Act required petitioners to determine (1) whether a recipient was discriminating, (2)

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[8] The court of appeals also held that respondents had sufficiently alleged standing (App. A, *infra*, 7a n.16). Judge Tamm agreed that respondents "have standing adequate to survive a motion to dismiss" (*id.* at 8a), although he expressed substantial doubt whether respondents would actually be able to prove that petitioners' conduct had caused respondents' alleged injuries or that the relief requested would redress the injuries claimed (*id.* at 8a-14a).

whether the recipient or the state was attempting to comply voluntarily within "a reasonable time," (3) whether the failure to comply was "substantial," and (4) whether a partial or complete fund termination is appropriate (*id.* at 17a-20a).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the personal damages liability of federal officials for failing to initiate fund termination proceedings with regard to state and local agencies that allegedly discriminate in violation of federal law. The court of appeals has held that the victims of the allegedly discriminatory practices of local governments may seek substantial damages from the Attorney General and other high ranking federal officials, even though those officials did not authorize, control, supervise, or otherwise directly encourage the local agencies' allegedly discriminatory practices. As a result, petitioners may be held personally liable merely because they chose to pursue voluntary compliance or other means of redress rather than the ultimate sanction of a fund termination lawsuit.

This unprecedented ruling seriously misconstrues this Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), regarding the absolute immunity enjoyed by federal officials who make administrative prosecutorial determinations. Furthermore, the conclusion that federal officials may be held personally liable for failing to terminate funding to discriminatory local agencies is patently inconsistent with the decisions of this Court and the lower courts concerning constitutional causes of action. Particularly in light of this Court's directive in *Economou* that "[i]nsubstantial lawsuits" against federal officials "should not survive

a motion to dismiss" (438 U.S. at 507-508), review of the decision below is essential.

1. a. In *Butz* v. *Economou*, *supra*, the Court held that "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts" and that "agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment." 438 U.S. at 515-516. See also *Ferri* v. *Ackerman*, 444 U.S. 193, 202-205 (1979); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). Although *Economou* concerned an administrative decision to bring charges, the Court made clear that the same protections must apply to administrative decisions not to bring charges: just as a criminal prosecutor has absolute immunity "in deciding which suits to bring" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 424), so too an administrative official may not be held personally liable for determining "whether a proceeding should be brought" (*Butz* v. *Economou*, *supra*, 438 U.S. at 515). In other words, an administrative official, in carrying out his supervisory responsibilities under a statute, enjoys absolute immunity from damages liability with regard to his decision not to initiate an enforcement proceeding. See also *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 426 n.24, 431 n.33; *Yaselli* v. *Goff*, 12 F.2d 396, 404-406 (2d Cir. 1926) (collecting authorities), aff'd mem., 275 U.S. 503 (1927).

As Judge Tamm pointed out in his dissenting opinion (App. A, *infra*, 16a-17a), the imposition of civil liability on an administrative official for failing to commence an enforcement proceeding would substantially eviscerate the absolute immunity for administrative prosecutors recognized in *Economou*. The de-

terminations whether or not to enforce a particular statute in a particular circumstance are inextricably interrelated aspects of the same decision-making process. Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980). Hence, a rule that would fully protect decisions to prosecute but would extend only qualified immunity to decisions not to prosecute would distort the exercise of prosecutorial discretion in favor of prosecution. See *Butz* v. *Economou, supra*, 438 U.S. at 515; *Imbler* v. *Pachtman, supra*, 424 U.S. at 426 n.24. Particularly in doubtful, close, or controversial cases, prosecutors would be unable to exercise their important responsibilities "free from intimidation or harassment." *Butz* v. *Economou, supra*, 438 U.S. at 516.[9]

The allegations of respondents' complaint highlight the kinds of difficult prosecutorial decisions that generally confront federal officials who are responsible for enforcing the various funding termination statutes. Respondents alleged that petitioners had relied too heavily on ineffective attempts to secure voluntary compliance and had pursued legal remedies other than the drastic measure of terminating LEAA funding. See C.A. App. 20-21, 29, 31-32.[10] In addition,

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[9] In fact, in order to avoid personal liability, a prosecutor might conceivably commence and then dismiss a lawsuit. Because those decisions are fully protected by absolute immunity (see *Imbler* v. *Pachtman, supra*, 424 U.S. at 424, quoting *Pearson* v. *Reed*, 6 Cal. App. 277, 287, 44 P.2d 592, 597 (1935)), it makes little sense to conclude that an official may be held personally liable for failing to initiate a lawsuit in the first instance.

[10] For example, the complaint alleges that petitioners made "unsuccessful efforts to achieve voluntary civil rights compliance from the Philadelphia Police Department" (¶ 47, reprinted at C.A. App. 20) and that, although petitioners

respondents asserted that petitioners had declined to investigate or initiate fund termination suits because the discrimination alleged was de minimis or uncertain in nature or because the grantee was already the subject of litigation or a court order designed to secure compliance. See *id.* at 24-29, 33-34, 49.[11]

In sum, regardless of whether petitioners were correct in their judgments on these matters, their decisions concerning the allocation of prosecutorial resources and the exercise of prosecutorial discretion are precisely the type of decision-making that the Court has sought to insulate from the intimidation and distortion that accompanies the possibility of personal damages liability. See *Butz* v. *Economou*, *supra*, 438 U.S. at 515-516; *Ferri* v. *Ackerman*, *supra*, 444 U.S. at 202-204. See also *United States* v. *Lovasco*, 431 U.S. 783, 791-795 (1977).[12] A qualified immunity,

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formally referred this matter to the Civil Rights Division of the Department of Justice for legal action, they failed to initiate funding termination proceedings (¶¶ 47-50, reprinted at C.A. App. 20-21).

[11] Prosecutors, of course, enjoy absolute immunity with regard to the decision whether or not to investigate as well as whether or not to commence formal judicial proceedings. See, *e.g.*, *Marrero* v. *City of Hialeah*, 625 F.2d 499, 505-506 n.8 (5th Cir. 1980); *Lee* v. *Williams*, 617 F.2d 320 (2d Cir. 1980); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1212-1214 (3d Cir. 1979), petition for cert. pending, No. 79-1120. Cf. *Kipps* v. *Ewell*, 538 F.2d 564, 566 (4th Cir. 1976).

[12] We do not suggest that an administrative prosecutor's decisions are immune from judicial review altogether. In appropriate circumstances, an administrative decision may be subject to limited judicial review. See, *e.g.*, *Marshall* v. *Jerrico, Inc.*, *supra*, 446 U.S. at 249; *Cannon* v. *University of Chicago*, 441 U.S. 677, 707 n.41 (1979); *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). But such injunctive actions are a far cry from the personal damages suit presented here. See *Dennis* v. *Sparks*, No. 79-1186 (Nov. 17, 1980), slip op. 7.

which would necessitate an inquiry into the prosecutor's motivations and the intimate details of his decision-making process, would plainly "disserve the broader public interest * * * [by] prevent[ing] the vigorous and fearless performance of the prosecutor's duty * * *." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427.

b. The court of appeals nonetheless held that petitioners are not entitled to absolute immunity, because, in the court's view, petitioners had "virtually no discretion under the relevant statute in deciding whether to terminate LEAA funding of discriminatory recipients" (App. A, *infra*, 6a). This is incorrect. As Judge Tamm observed (*id.* at 17a-20a), Sections 509 and 518, like numerous other statutes governing the termination of federal funding, require the exercise of substantial discretion.[13] Indeed, because the cutoff of federal funds may often cause serious dislocation and harm to innocent third parties, federal officials, including petitioners, have traditionally enjoyed broad authority to decide whether and when to initiate fund termination proceedings or to take other remedial administrative action. Cf. *Marshall* v. *Jerrico, Inc.*, *supra*, 446 U.S. at 248-249.

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[13] As indicated above, Congress amended Sections 509 and 518 in 1976, after the commencement of this suit. See Crime Control Act of 1976, Pub. L. No. 94-503, Section 122, 90 Stat. 2418; App. A, *infra*, 7a n.16, 20a-21a n.16. Those amendments do not affect the issues presented by this case. We further note that the pre-1976 versions of Sections 509 and 518 are typical funding termination provisions. See, *e.g.*, Comprehensive Employment and Training Act, 29 U.S.C. (Supp. II) 834(b), 816(c); Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1; Housing and Community Development Act of 1974, 42 U.S.C. 5309, 5311(a); Urban Mass Transit Act, 49 U.S.C. (Supp. II) 1615.

Sections 509 and 518, like other funding termination provisions (see note 13, *supra*), vest broad enforcement discretion in the appropriate LEAA officials. At a minimum, just as a prosecutor must decide whether the evidence supports a criminal charge, so too petitioners had to make an initial determination whether a recipient of LEAA funding "has failed to comply with" the nondiscrimination provision of the statute and LEAA regulations.[14] See 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2).[15] Cf. *Dunlop* v. *Bachowski*, 421 U.S. 560, 571 (1975). In addition, after notifying the grantee state's Governor of the noncompliance, petitioners had broad discretion to determine whether "within a reasonable time" the Governor or LEAA grantee had taken appropriate steps to comply voluntarily. See 42 U.S.C. (1970 ed., Supp. V) 3766(c)(2). Moreover, because funding termination could only be predicated on a showing of "substantial" noncompliance (42 U.S.C. (1970 ed., Supp. V) 3757), petitioners could not properly commence a funding termination suit even after exhausting voluntary methods of compliance unless they believed that the evidence would show a substantial violation. Finally, Sections 509 and 518 plainly authorized petitioners to pursue various different enforcement remedies, including partial as well as

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[14] That determination ordinarily entails consideration of a complex variety of factors, including recruitment efforts, size and characteristics of the applicant pool, and legal adequacy of preselection testing procedures.

[15] Sections 509 and 518 focus on LEAA's authority and responsibilities rather than the responsibility of the individual federal officials. Petitioners as a group generally exercised this authority and responsibility although their roles in or regarding LEAA were quite different. See note 7, *supra*.

complete funding termination. See 42 U.S.C. (1970 ed., Supp. V), 3757, 3766(c)(2) & (3).

Furthermore, we submit that petitioners had discretion to decline commencement of a fund termination suit even though the evidence indicated that a grantee was engaged in substantial discrimination. To be sure, Section 518(c)(2) states that "[i]f within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration *shall* exercise the powers and functions provided in section [509]." 42 U.S.C. (1970 ed., Supp V) 3766(c)(2) (emphasis supplied). But most criminal provisions, including 28 U.S.C. 547, which provides that the United States Attorneys "*shall* * * * prosecute for all offenses against the United States," are also written in mandatory terms.[16] It is nonetheless well settled that a federal prosecutor has broad discretion, unreviewable by the judiciary, not to prosecute even if there is substantial evidence of guilt. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.); *United States* v. *Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). Likewise, this Court has repeatedly recognized that administrative prosecutors possess similarly broad discretion notwithstanding the seemingly mandatory language of the particular statutory scheme. See, *e.g.*, *Marshall* v. *Jerrico, Inc.*, *supra*, 446 U.S. at 248; *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 571-573; *Vaca* v.

[16] The typical federal criminal statute provides that whoever commits a prohibited act *shall* be punished. See, *e.g.*, 18 U.S.C. 371, 1001.

Sipes, 386 U.S. 171, 182 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413-414 (1958).

The legislative history of the Act confirms that petitioners had substantial discretion with regard to the initiation of funding termination proceedings. Although the original version of the LEAA funding cutoff scheme was also couched in "mandatory" terms (see 42 U.S.C. (1970 ed.) 3757), the House Report accompanying the Act explained that "the Attorney General *may* terminate or suspend payments * * * on a finding [that] there is a substantial failure to comply * * *" and that he has "broad discretionary power" over the funding termination process. H.R. Rep. No. 488, 90th Cong., 1st Sess. 14, 26 (1967) (emphasis supplied). See also S. Rep. No. 1097, 90th Cong., 2d Sess. 85 (1968). In amending the Act in 1973, Congress did not divest LEAA of its broad discretion. To the contrary, the pertinent legislative history shows that the LEAA funding termination provisions were patterned after the discretionary cutoff provisions of Title VI of the Civil Rights Act and various revenue sharing statutes and therefore that LEAA funding would not automatically be suspended merely because a grantee had engaged in discrimination. See, *e.g.*, 119 Cong. Rec. 20097 (1973) (remarks of Rep. Jordan); *Amendments to Title I (LEAA) of the Omnibus Crime Control and Safe Streets Act of 1968: Hearing Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 183 (1973). Indeed, Congress again amended Sections 509 and 518 in 1976 precisely because it thought that LEAA had too much discretionary authority. See, *e.g.*, H.R. Rep. No. 94-1155, 94th Cong., 2d Sess. 11, 25-27 (1976); 122 Cong. Rec. 28498 (1976) (remarks of Rep. McClory).

2. Even assuming that petitioners are not entitled to absolute immunity with regard to their fund termination decisions, the court of appeals should have dismissed respondents' damages claims for failure to state a constitutional cause of action.[17] We do not dispute that, in appropriate circumstances, intentional governmental classifications may give rise to a damages action under the Fifth Amendment. See *Davis* v. *Passman*, 442 U.S. 228 (1979). In the absence of an invidiously discriminatory purpose, however, it is well settled that an official act is not unconstitutional solely because it has a discriminatory effect or impact. See, *e.g.*, *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 273-281 (1979); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239-241 (1976). Accordingly here, although some local police departments may have violated respondents' constitutional rights, it is apparent that petitioners did not.

Respondents do not allege that petitioners conspired with local officials to discriminate against them or that petitioners otherwise controlled, directed, or authorized the discriminatory practices of LEAA funding recipients. To the contrary, respondents' complaint details petitioners' efforts, albeit perhaps ineffective, to deter employment practices that violated LEAA's explicit statute and regulations. See 42 U.S.C. 3766(c)(1); 28 C.F.R. Part 42. Thus, respondents' essential contention is that petitioners'

[17] Although this issue was raised in the district court, in petitioners' Supplemental Brief in the court of appeals, and in their petition for rehearing below, the court of appeals declined to address this point. Compare *Butz* v. *Economou*, *supra*, 438 U.S. at 507-508.

attempts to secure compliance were inadequate and that their failure to terminate LEAA funding had the effect of encouraging continued local discrimination. But even if that doubtful assertion is true,[18] respondents' allegations fall far short of stating a constitutional claim under the Fifth Amendment. See *Personnel Administrator* v. *Feeney, supra; Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra; Washington* v. *Davis, supra.*

The First Circuit has recently applied these important principles in a closely related context. In *Francis-Sobel* v. *University of Maine*, 597 F.2d 15 (1st Cir.), cert. denied, 444 U.S. 949 (1979), the court of appeals affirmed the dismissal of a damages claim against an EEOC official for failing to give proper handling to the plaintiff's discrimination complaint against a state university. The court explained (597 F.2d at 18):

> Nor do we think that even arbitrary and capricious denial of the investigative and conciliatory benefits the EEOC can provide to a charging party transgresses the Due Process Clause in a way that would support the implication of a damage remedy. Unlike *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 * * * (1971), this case involves the loss of alleged statutory rights to administrative assistance in the vindication of underlying, fundamental statutory and constitutional interests. The interests themselves have

[18] It is unlikely that the Philadelphia Police Department, for example, would have ceased its allegedly discriminatory practices because LEAA terminated 0.6% of its budget (see note 2, *supra*), when that particular police department had resisted all other efforts to secure compliance. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40-43 (1976).

> not been lost, only the help that Congress intended charging parties receive in vindicating those rights. We think that such statutory rights, if they be "liberty or property" at all within the meaning of the Due Process Clause, are so tangential to the [plaintiffs' underlying rights] * * * that an implied right of action [under the Constitution] cannot and should not be found here. Indeed, were we to find that the right to EEOC assistance is protected by an implied right of action found in the Fifth Amendment, then every federal bureaucrat would be subject to judicial review of the most minute aspects of his responsibilities as they affect members of the public.

In contrast, the decision of the court of appeals in this case would subject federal officials concerned with supervision of federal funding to personal damages liability for the discriminatory acts of grantee state and local governments, even though the federal officials were not responsible for the discrimination and the victims of such discrimination have fully adequate remedies against the recipients of federal funds. See *Owen* v. *City of Independence, Missouri*, 445 U.S. 622 (1980); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); 42 U.S.C. 1983, 2000e, 3766(c)(4)(A). Cf. *Carlson* v. *Green*, No. 78-1261 (Apr. 22, 1980).[19]

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[19] We do not understand respondents to assert a statutory right to damages relief. In any event, such a claim would be frivolous. Nothing in the language or legislative history of the Act suggests that Congress intended to permit damage claims against LEAA officials. In fact, in 1976, Congress amended the Act to create a private remedy against LEAA funding recipients who practice discrimination. See Crime Control Act of 1976, Pub. L. No. 94-503, Section 122(b), 90 Stat. 2421, codified at 42 U.S.C. 3766(c)(4)(A); 122 Cong. Rec. 28514, 33879-33884 (1976) (remarks of Rep. Butler and

This Court's decisions concerning "state action" under the Fourteenth Amendment strongly support the conclusion that respondents have failed to allege a constitutional damages claim. In *Martinez* v. *California*, 444 U.S. 277 (1980), for example, the plaintiffs' decedent was murdered by a paroled felon soon after his release from prison. Although the parole officers' determination to release the felon may have been a proximate cause of the death, the Court unanimously concluded that the murder "is too remote a consequence of the parole officers' action to hold them responsible * * *." *Id.* at 285. And in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172-177 (1972), the Court held that the discriminatory practices of a private club could not be attributed to the state merely because the state regulated the club and conferred benefits to it in the form of a liquor license. In other words, a state and its officials are not liable for private discriminatory conduct unless they have purposefully caused or affirmatively encouraged such conduct. See also *Flagg Brothers* v. *Brooks*, 436 U.S. 149, 166 (1978); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350-359 (1974). So too here, petitioners, who have neither caused nor affirmatively approved the discriminatory practices alleged in the complaint, may not be held personally liable for respondents' injuries.

3. If the Court disagrees with our submissions regarding absolute immunity and constitutional causes of action, petitioners are nonetheless entitled to invoke a qualified immunity as a matter of law. Certainly no decision of this Court or of any court of

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Sen. Hruska). No cause of action was created against the United States or its officials, however, and none should be implied. See, *e.g.*, *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974).

appeals has previously suggested that the mere failure to terminate federal funding gives rise to a Fifth Amendment claim for damages. Indeed, in 1975, when petitioners' actions occurred, it was far from clear whether many of the discriminatory practices of grant recipients alleged by respondents even amounted to a violation of the Equal Protection Clause. The use of size and weight requirements and written exams by local police departments at that time involved rapidly developing and unsettled areas of the law. See, *e.g.*, *Washington* v. *Davis*, *supra*. Because petitioners thus had no reason to believe that their actions were violating clearly established constitutional rights, respondents' claim for damages should have been summarily dismissed. See, *e.g.*, *Butz* v. *Economou*, *supra*, 438 U.S. at 507-508; *Procunier* v. *Navarette*, 434 U.S. 555, 564-566 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 321-322 (1975). See also *Trapnell* v. *Riggsby*, 622 F.2d 290, 295-296 (7th Cir. 1980); *Douthit* v. *Jones*, 619 F.2d 527, 534 (5th Cir. 1980); *Atcherson* v. *Siebenmann*, 605 F.2d 1058, 1063-1067 (8th Cir. 1979).[20]

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[20] Nothing in respondents' complaint or the record before the district court suggests that petitioners' actions or failure to act were motivated by bad faith. To the contrary, as we argued in the court of appeals, that record establishes petitioners' good faith as a matter of fact. See Br. for Appellees 5-6, 9-16, 51-53; C.A. App. 186-245. Notwithstanding the Court's directive in *Butz* that the federal courts should be "alert to the possibilities of artful pleading" and that "damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity" (438 U.S. at 507-508), the court of appeals declined to address this contention. See also *Hanrahan* v. *Hampton*, Nos. 79-912 & 79-914 (June 2, 1980) (Powell, J., dissenting), slip op. 5-7.

In sum, respondents' "extravagant charges" (*Hanrahan* v. *Hampton*, Nos. 79-912 & 79-914 (June 2, 1980) slip op. 6 (Powell, J., dissenting)) should not force these federal officials, including the Attorney General, to undergo the expense and burden of a trial. Even if petitioners ultimately were to prevail, the prospect of defending such lawsuits in the future can hardly fail to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, *supra*, 177 F.2d 579, 581 (2d Cir. 1949). By overturning the district court's summary dismissal of respondents' complaint and remanding for trial, the court of appeals grossly "misappreciated the premises on which this Court rested its ruling in" *Butz* v. *Economou*. *Hanrahan* v. *Hampton*, *supra*, slip op. 6 (Powell, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1980

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION, ET AL., APPELLANTS

v.

RICHARD W. VELDE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE LAW ENFORCEMENT ASSISTANCE ADMIN., ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 75-1444)

Argued January 5, 1979

Decided May 14, 1980

Before: BAZELON, *Senior Circuit Judge*, TAMM, *Circuit Judge* and PARKER *, *United States District Court Judge* for the District of Columbia

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Opinion concurring in part, concurring in result in part, and dissenting in part filed by *Circuit Judge* TAMM.

BAZELON, *Senior Circuit Judge*: Appellants, twelve individuals and an organization,[1] appeal the district court's dismissal of their complaint. They alleged that federal agencies and officials unlawfully failed to terminate federal funding of state and local law enforcement agencies despite evidence that the funds were "used to discriminate on grounds of race and sex against plaintiffs and members of their class."[2] Appellants sought declaratory and injunctive relief against the Law Enforcement Assistance Administration (LEAA),[3] the Department of Justice, and four officials in those agencies. Appellants also sought

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[1] The individual appellants include six blacks and six women who alleged that they were denied employment, passed over for promotion, or discharged solely on the basis of their race or sex by state and local law enforcement agencies that receive funds from the Law Enforcement Assistance Administration (LEAA). The organizational appellant is the National Black Police Association, a not-for-profit Illinois corporation with over 50 affiliates in at least 20 states.

[2] Complaint ¶ 1, Appendix (App.) 5. Plaintiffs moved for class certification, but the district court did not rule on the motion before it dismissed the action.

[3] The LEAA, an agency within the Department of Justice, was created by Congress in 1968 to assist community and citizen groups in their law enforcement and criminal justice activities. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. I, 82 Stat. 197 (1968), (current version at 42 U.S.C. §§ 3701 *et seq.* (1976)).

compensatory and punitive damages against the four officials in their individual capacities.[4]

Relying on the doctrines of mootness and official immunity, the district court dismissed all of appellant's claims. For reasons that appear below, we reverse.

I.

On the basis of 1976 amendments to the Omnibus Crime Control and Safe Streets Act of 1968 (Omnibus Crime Control Act),[5] the district court dismissed appellants' claims for declaratory and injunctive relief as moot. We disagree.

The Omnibus Crime Control Act was first amended in 1973 to require LEAA to terminate federal funding to recipients that engage in discriminatory practices.[6] In response to LEAA's failure to carry out this civil rights enforcement requirement,[7] Congress amended the Act in 1976[8] by adding more detailed mandatory procedures to be followed by LEAA in either securing compliance with the Act's antidis-

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[4] Complaint at p. 35, App. 38.

[5] Pub. L. No. 90-351, 82 Stat. 206 (1968).

[6] Pub. L. No. 93-83, § 2, 87 Stat. 214, 42 U.S.C. § 3766(c) (1976).

[7] The House Report on the 1976 amendments stated that "[t]he response of LEAA to the 1973 civil rights amendments has been less than minimal." H.R. Rep. No. 94-1155, 94th Cong., 2d Sess. 11 (1976). The report also stated that LEAA had not terminated its funding of any recipient "[]despite positive findings of discrimination by courts and administrative agencies . . . ." *Id.*

[8] Pub. L. No. 94-503, § 122(b), 90 Stat. 2418 (1976), 42 U.S.C. § 3766(c)(2) (1976).

crimination provision or terminating funds to non-complying recipients.

The 1976 amendments have no bearing on appellants' claims that they were injured as a result of appellees' conduct or on appellee's civil rights enforcement duties under either the Omnibus Crime Control Act or the other constitutional and statutory provisions upon which appellants base their claims for relief.[9] Thus, the 1976 amendments did not render any of appellants' claims moot and, on remand, appellants will be entitled to proceed on all causes of action stated in their complaint.[10]

II.

The district court dismissed appellants' claims for monetary damages against the four agency officials in their individual capacities on the ground of abso-

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[9] In addition to their claims under the Omnibus Crime Control Act, appellants purported to state causes of action under the fifth and fourteenth amendments; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-4 (1976); *id.* §§ 1981, 1983, 1986; and Executive Orders No. 11,246 and 11,375.

[10] Some of appellants' requests for injunctive and declaratory relief, as well as the claims for damages, are based upon allegations of LEAA's past failure to terminate funding to offending law enforcement agencies. These claims are utterly unaffected by the 1976 amendments. Moreover, appellees' underlying obligation to secure compliance with civil rights obligations or terminate funding is not affected by the 1976 amendments. Thus, the claims for declaratory and injunctive relief that are prospective in nature are based upon allegations of injury that have not been affected by the amendments. To the extent that these prospective claims require proof of LEAA's present failure to follow the new procedures required by the Omnibus Crime Control Act, appellants should be given the opportunity to prove such failure.

lute immunity. Subsequent to the district court's decision, however, the Supreme Court limited the doctrine of official immunity. We find this case now falls outside those limits, and thus reverse the district court's dismissal of the claims for monetary damages.

In *Butz* v. *Economou*,[11] the Supreme Court held that as a general rule, federal officials obtain only a qualified immunity in suits raising constitutional violations. Instead of an absolute immunity, federal officials can be sued and can defend only on the basis of good faith and reasonable grounds for their conduct.[12]

Appellees claim they are covered by a limited exception for administrative officials performing judicial and prosecutorial functions. Recognized by the Supreme Court in *Economou*, this exception was carved out to preserve absolute immunity where "essential for the conduct of the public business." 438 U.S. 478, 507 (1978). As the Court reasoned, absolute immunity is necessary to protect discretionary prosecutorial decisions from the potentially distorting effect of civil liability.[13] Appellees claim that the

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[11] 438 U.S. 478 (1978).

[12] The Court limited the availability of an absolute immunity defense to actions raising common-law tort causes of action. *See* 438 U.S. at 488-89 (construing Barr v. Matteo, 360 U.S. 564 (1959) (libel action)).

[13] An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. . . .

* * * *

The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete.

438 U.S. 478, 515 (1978).

complaint challenges "the conduct of LEAA's prosecutorial role in enforcing civil rights laws" [14] and thus should be met by a defense of absolute immunity. We cannot agree.

The purpose of shielding discretionary prosecutorial decisions from fears of civil liability has no place where, as here, agency officials lack discretion. Appellees have virtually no discretion under the relevant statute in deciding whether to terminate LEAA funding of discriminatory recipients. The Omnibus Crime Control Act, as amended in 1973, provides that

> . . . [w]henever the Administration determines that a State government or any unit of general local government has failed to comply with [the nondiscrimination requirement] or an applicable regulation, it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise . . .

its fund termination powers.[15] The minimal matters left to LEAA's judgment—such as the assessment of "reasonable time after notification"—do not rise to the level of prosecutorial discretion that is protected by absolute immunity. Accordingly, we find that ap-

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[14] Appellees' Supp. Br. at 4.

[15] The mandatory language of 42 U.S.C. § 3766(c)(2) (Supp. V 1975) (amended 1976), when read in light of appellees' constitutional and independent statutory duty not to allow federal funds to be used in a discriminatory manner by recipients, takes appellees' civil rights enforcement duties outside the realm of discretion. *See* Brown v. Califano, No. 78-1864 (D.C. Cir. Jan. 31, 1980).

pellees have only a defense of qualified immunity and reverse the district court's dismissal of the claims for monetary damages. Appellants should be allowed to go to trial on their claims for damages and appellees given a chance to establish a defense of good faith or reasonable grounds for their conduct.[16]

III.

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

So ordered.

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[16] Appellees also raise, as they did in the district court, the issue of appellants' standing to maintain this action. The National Black Police Association's standing has not—and indeed it cannot—be challenged. It alleged harm to itself and its members as a result of appellees' alleged failure to terminate funding to discriminatory recipients. *Cf.* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972). Similarly, individual appellants have alleged violations of their right to be free from federal funding of state and local agencies that have discriminated against them. They have a sufficiently "personal stake in the outcome of the controversy," Baker v. Carr, 369 U.S. 186, 204 (1962), and their interest is precisely that which is protected by the Constitution and the statutes under which appellants have proceeded, Flast v. Cohen, 392 U.S. 83, 102 (1968); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). The 1976 amendments to the Omnibus Crime Control Act, which added a judicial review provision for parties such as appellants, remove any doubt as to appellants' standing. Pub. L. No. 94-503, § 122(b), 90 Stat. 2421 (1976), 42 U.S.C. § 3766(c)(4)(A) (1976), and we are satisfied that—absent a failure of proof after discovery is completed—appellants have standing to maintain this action. The district court did not rule on appellants' standing argument, and we expect that the district court will dispose of the pending motion to dismiss for lack of standing, along with pending motions to resume discovery and for class certification on remand.

TAMM, *Circuit Judge, concurring in part, concurring in result in part, and dissenting in part*: The majority opinion in this case deals with three issues: mootness,[1] standing,[2] and official immunity.[3] I concur in Judge Bazelon's analysis and result on the mootness question and therefore do not address that issue further. Although I also agree that plaintiffs-appellants have standing adequate to survive a motion to dismiss, I reach this result by a route different from that of the majority. On the question of whether the individual defendants are protected by absolute immunity, I dissent.[4]

I. STANDING

In *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), the Supreme Court summarized the law of standing. "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Id.* at 99. Moreover,

> [e]ven when a case falls within these constitutional boundaries, a plaintiff may still lack standing under . . . prudential principles [if he does not] assert an injury that is peculiar to himself

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[1] *See* Maj. Op. at 3-4.

[2] *See id.* at 7 n.16.

[3] *See id.* at 4-7.

[4] Congress recently enacted the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167, which amends and recodifies the statutory provisions governing the Law Enforcement Assistance Administration (LEAA). This enactment does not bear on the present action, *see id.* § 1301(e), and therefore is not addressed in this opinion.

> or to a distinct group of which he is a part, rather than one "shared in substantially equal measure by all or a large class of citizens."

Id. at 99-100 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). Although Congress may modify such prudential principles,[5] it may not "abrogate the Art.

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[5] Congress has not modified these principles for actions such as the present one. Contrary to the majority's statement, *see* Maj. Op. at 7 n.16, 42 U.S.C. § 3766(c)(4)(A) (1976) does not attempt to confer standing on litigants such as the plaintiffs here. As the statute on its face suggests, and as its legislative history confirms, the provision in question only authorizes an action against *state or local* governments or officials that have discriminated in violation of 42 U.S.C. § 3766(c) (1976). No action against the federal government or its officials was intended, and thus the present suit is not authorized by this statute.

Section 3766(c)(4)(A) provides:

> Whenever a State government or unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this subsection, a civil action may be instituted after exhaustion of administrative remedies by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction. Administrative remedies shall be deemed to be exhausted upon the expiration of sixty days after the date of the administrative complaint was filed with the Administration, or any other administrative enforcement agency, unless within such period there has been a determination by the Administration or the agency on the merits of the complaint, in which case such remedies shall be deemed exhausted at the time the determination becomes final.

42 U.S.C. § 3766(c)(4)(A) (1976). Although the statute does not expressly state against whom "a civil action may be instituted," the language of the statute rather clearly reveals an intent to authorize a private action only against those

entities or individuals that have actually engaged in the discrimination.

The legislative history of § 3766(c)(4)(A) confirms this view. Although a House of Representatives committee report on the legislation contains a statement suggesting the availability of an action "against the United States" as well as against state and local governments and officials, *see* H.R. REP. No. 94-1155, 94th Cong., 2d Sess. 27 (1976), the language contained in § 3766(c)(4)(A) was added by a House floor amendment *after* the House Judiciary Committee had adopted this report, *see* 122 CONG. REC. 28,513-14 (1976). In support of this floor amendment, Representative Butler stated: "[P]rivate civil actions are authorized against *a State government or unit of local government* where an officer or employee in an official capacity has engaged in a pattern or practice of discrimination prohibited by this section." *Id.* at 28,514 (emphasis added). The Senate version of the legislation had no provision comparable to § 3766(c)(4)(A), but the Senate agreed to the provision as part of a conference report that resolved House and Senate differences. *See* 122 CONG. REC. 33,879-84 (1976). In support of the conference report, Senator Hruska described the private-action provision contained in the report:

> [T]he act authorizes private parties to initiate civil actions in Federal or State courts against a *State government or unit of local government or any officer or employee thereof* acting in an official capacity whenever such government employee or officer has engaged or is engaging in any discriminatory act or practice prohibited by the LEAA Act. This provision is an analogy to title 42, section 19[83], United States Code, which authorizes action in Federal court against State or local officials acting under color of law.

Id. at 33,880 (emphasis added).

The fact that Congress considered the possibility of a cause of action against federal officials, but instead adopted a provision authorizing suits only against state or local officials, may well bear on the merits of plaintiffs' claims in this case. Like the majority, however, I believe it inadvisable to express any views on the merits of this case without a more complete evidentiary record and without a district court consideration of the many issues that are presented.

III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' [*Warth* v. *Seldin*, 422 U.S. at 501], that is likely to be redressed if the requested relief is granted. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, [426 U.S. 26, 38 (1976)]." *Id.* at 100.[6]

In the present case, plaintiffs allege that state and local entities funded by the Law Enforcement Assistance Administration (LEAA) have unlawfully discriminated against them.[7] Being subjected to unlaw-

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[6] It would seem a fine line indeed between the prudential principle that a plaintiff must assert "an injury that is peculiar to himself" and the supposedly less stringent constitutional requirement that he assert "a distinct and palpable injury to himself."

[7] Plaintiffs also claim that the Government's standing argument is wrong for the simple reason that it has a mistaken premise, namely, the statement that plaintiffs' "alleged injuries" are the "alleged racial discrimination by certain state and local law enforcement agencies." This is *not* the legal injury which forms the basis of *this* lawsuit. Rather, the legal injury which plaintiffs suffer is defendants' knowing funding of discriminatory law enforcement agencies in contravention of constitutional and statutory obligation owed by *defendants* to plaintiffs.

Reply Brief for Appellants at 27 (emphasis in original). In making this claim of injury, plaintiffs expressly eschew any reliance on their status as taxpayers. Transcript of Oral Argument at 6.

This claim of injury must be rejected. If plaintiffs are saying that their injury derives from being discriminated against with federal, as opposed to state or local, funding, their supposed "injury" is too tenuous and abstract to suffice as a basis for standing. If, on the other hand, they are claiming an injury merely in the fact that the defendants fund unlawful discrimination, without regard to whether they personally

ful discrimination is clearly a distinct and personal injury sufficient to satisfy both article III and the prudential standing rules. The more difficult question relates to "the redressability aspect of standing," *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, No. 79-1123, slip op. at 7 (D.C. Cir. Feb. 8, 1980), which is part of "the Art. III minima," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100.[8] Under this aspect of the standing doctrine, a plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 38. In other words, "there [must be] a 'substantial likelihood' that the relief requested will redress the injury claimed . . . ." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978). As this court has observed, recent Supreme Court cases "reveal[] the seriousness with which the Supreme Court has taken" this aspect of standing. *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, slip op. at 7. *See also NAACP*,

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are victims of the discrimination, this does not constitute "'a distinct and palpable injury to [themselves],'" Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)), let alone "an injury that is peculiar to [themselves] or to a distinct group of which [they are] a part, rather than one 'shared in substantially equal measure by all or a large class of citizens,'" *id.* at 100 (quoting Warth v. Seldin, 422 U.S. at 499). Such a generalized grievance simply does not constitute sufficient "injury" for the purpose of standing to sue in the federal courts.

[8] Because this aspect of standing is constitutionally required, the presence of a statute attempting to modify this rule would not be controlling. *See also* notes 5-6 *supra*.

Boston Chapter v. *Harris*, 607 F.2d 514, 520-22, 524 (1st Cir. 1979).

In arguing that plaintiffs lack standing, the Government relies heavily on *Simon* v. *Eastern Kentucky Welfare Rights Organization*. In *Eastern Kentucky*, a group of indigents contended that the Internal Revenue Service had violated its statutory obligations by granting favorable tax treatment to nonprofit hospitals even though the hospitals denied most services to indigents. The Court found that the indigents lacked standing, because it was "purely speculative" that a favorable court decision would redress their injuries: "So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services." 426 U.S. at 42-43.

The Government argues that the *Eastern Kentucky* rationale applies in the present case

> since [plaintiffs] cannot show that their alleged injuries (alleged racial discrimination by certain state and local law enforcement agencies) are likely to be redressed by a favorable decision and the judicial relief they seek (the termination of LEAA funding to those state and local agencies). Plaintiffs cannot make this showing because the state and local agencies might well choose not to receive LEAA funding rather than to discontinue their challenged practices.

Brief for Appellees at 34-35 (citations omitted). This case, however, comes to us on a motion to dismiss, granted by the district court before any discovery or evidentiary proceedings had begun. Thus, although the Government might be correct in asserting that

plaintiffs cannot establish "the redressability aspect of standing," they have not yet had an opportunity to do so.[9] In *Committee for Full Employment* v. *Blumenthal*, 606 F.2d 1062 (D.C. Cir. 1979) (Bazelon, J.), this court faced a nearly identical situation. The plaintiffs in that case had sued the Secretary of the Treasury for failing to discontinue the funding of state and local governments that, according to the plaintiffs, had unlawfully discriminated against them. This court reversed the district court's decision to dismiss the action for lack of standing:

> At the very least, appellants were entitled to conduct discovery to buttress their allegation that there is a substantial likelihood that the relief they request will eliminate their injury. Their pleadings are not so deficient on their face, nor so implausible, that the district court was entitled to conclude the standing issue on a motion to dismiss.

Id. at 1067. Likewise, at this stage of the proceedings in the present case, plaintiffs' pleadings are sufficient to resist a motion to dismiss based on standing. In my view, contrary to the majority's suggestion, see Maj. Op. at 7 n.16, the district court should defer its final determination of the standing question until evidence is presented on the redressability issue.[10]

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[9] Although standing is usually decided on the pleadings, the question sometimes depends on the development of evidence concerning the factual requisites for establishing standing. *See* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 115 n.31 (1979); NAACP, Boston Chapter v. Harris, 607 F.2d 514, 526 (1st Cir. 1979).

[10] Although plaintiffs claim compensatory and punitive damages in addition to seeking declaratory and injunctive relief, this does not negate the requirement of standing. To be sure,

II. Official Immunity

The majority holds that the four individual defendants in this case are entitled only to qualified, and not to absolute, immunity in resisting plaintiffs' claims for monetary damages. I disagree.

In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Supreme Court ruled that a federal official's immunity from monetary liability for constitutional violations [11] is generally a qualified one, depending on proof that the official acted reasonably and in good faith. Nonetheless, the Court made clear that this general rule does not apply "where it is demonstrated that absolute immunity is essential for the conduct of public business." *Id.* at 507. In particular, the Court observed:

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a person suffering actual money damages has an adequate "injury" for standing purposes. Nonetheless, to establish his standing, the complainant must also show that his damages were caused by the governmental conduct that he claims was unlawful. The requirement of causation, which parallels "the redressability aspect of standing," demands that the complainant's injury "fairly can be traced to the challenged action of the defendant." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1975). *See* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 74 (1978). A claim of monetary damages cannot establish standing unless this causation/redressability component of the standing requirement is met.

[11] The Court in *Economou* limited its holding to constitutional claims, 438 U.S. at 495 n.22, although it also addressed claims of an "officer ignor[ing] an express statutory . . . limitation on his authority," *id.* at 489. Because I find that even under *Economou* the defendant officials are protected by an absolute immunity, I need not reach the issue of whether certain of plaintiffs' claims are outside the scope of the *Economou* ruling.

> We . . . believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought. . . .
>
> The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. . . .
>
> . . .
>
> We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment.

Id. at 515-16.

Although the Court in *Economou* emphasized the need to protect decisionmaking *in favor* of initiating or moving forward with proceedings, decisions *not* to initiate or move forward clearly must be given the same protection, for to immunize decisions in one direction but not the other would eviscerate the very discretion that the Court sought to protect. As the Government points out, to create a one-sided immunity protecting only decisions to move forward would be to create "an improper bias in decisionmaking, i.e., prosecutors would be encouraged to act, as opposed to taking no action. Prosecutors must be free to make a decision without being influenced in

either direction by fear of liability." Supplemental Brief for Appellees at 7.

To determine whether absolute "prosecutorial" immunity applies, we must focus on the particular conduct and circumstances that gave rise to the claim of liability. *See Tigue* v. *Swaim*, 585 F.2d 909, 914 (8th Cir. 1978). *See also Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1212 (3d Cir. 1979). Here, plaintiffs claim damages from the failure of the four individual defendants to terminate federal funding to state and local entities that were allegedly discriminating against plaintiffs. The challenged conduct relates directly to the defendant officials' decisionmaking concerning whether to move forward with a proceeding to terminate funding, or, for example, to seek voluntary compliance with the statutory nondiscrimination requirements (perhaps under the threat of termination). In my view, this type of decisionmaking is exactly what the Supreme Court had in mind when it spoke of functions "analogous to those of a prosecutor," *Butz* v. *Economou*, 438 U.S. at 515. *See also Simons* v. *Bellinger*, No. 77-2012 (D.C. Cir. Jan. 4, 1980) (finding members of bar association committee on unauthorized practice of law entitled to absolute immunity).

Contrary to the majority's suggestion, *see* Maj. Op. at 6, the defendant officials, under the applicable statutory scheme, did not lack the requisite discretion for "prosecutorial" immunity.[12] The key statu-

[12] Although the basic statutory provision concerning the prosecution of federal crimes states that "each United States attorney, within his district, *shall* . . . prosecute for *all* offenses against the United States," 28 U.S.C. § 547 (1976) (emphasis added), no one would seriously contend that United States Attorneys lack discretion in carrying out their prosecutorial functions. *See Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1967) (Burger, J.).

tory provisions are sections 3766(c)(2) and 3757 of title 42 of the United States Code, 42 U.S.C. §§ 3766 (c)(2), 3757 (Supp. V 1975) (amended 1976),[13] as

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[13] Section 3766(c)(2) provides:

> Whenever the Administration determines that a State government or any unit of general local government has failed to comply with [the nondiscrimination requirements], it shall notify the chief executive of the State of the noncompliance and shall request the chief executive to secure compliance. If within a reasonable time after such notification the chief executive fails or refuses to secure compliance, the Administration shall exercise the powers and functions provided in section 3757 of this title, and is authorized concurrently with such exercise—
>
> (A) to institute an appropriate civil action;
>
> (B) to exercise the powers and functions pursuant to title VI of the Civil Rights Act of 1964 (section 2000d of this title); or
>
> (C) to take such other action as may be provided by law.

42 U.S.C. § 3766(c)(2) (Supp. V 1975) (amended 1976). The "powers and functions provided in section 3757," in turn, are as follows:

> Whenever the Administration, after reasonable notice and opportunity for hearing to an applicant or a grantee under this chapter, finds that, with respect to any payments made or to be made under this chapter, there is a substantial failure to comply with—
>
> (a) the provisions of this chapter;
>
> (b) regulations promulgated by the Administration under this chapter; or
>
> (c) a plan or application submitted in accordance with the provisions of this chapter;
>
> the Administration shall notify such applicant or grantee that further payments shall not be made (or in its discretion that further payments shall not be made for activities in which there is such failure), until there is no longer such failure.

Id. § 3757 (amended 1976).

those sections read before Congress enacted amendments in 1976.[14] In concluding that section 3766 (c)(2) leaves "virtually no discretion" with the defendant officials, *see* Maj. Op. at 6, the majority relies on an unduly narrow reading of the statutory language.[15] For section 3766(c)(2) to apply, the appropriate LEAA officials must first "determine" that a governmental unit has violated the nondiscrimination provisions. After such a determination is made, the officials then seek voluntary compliance by the governmental unit with the assistance of the chief executive of the state involved. The LEAA officials must decide when a "reasonable time" has passed after such assistance has been unsuccessfully requested, at which point the officials are directed to

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[14] Plaintiffs' claims for damages are based on conduct of the defendant officials before the statute was amended in 1976, and it is thus the pre-amendment version of the statute that is controlling on the damages question. Even as amended in 1976, however, there is still room for some discretion concerning determinations of noncompliance. *See* H.R. REP. NO. 94-1155, 94th Cong., 2d Sess. 26-27 (1976).

[15] Speaking on the floor of the House of Representatives, Representative Jordan described the intended operation of these nondiscrimination provisions:

> [W]e now have a provision in the bill which will strengthen civil rights enforcement, a provision in the bill which will not say we cut off the funds if they simply discriminate, but that this Law Enforcement Assistance Administration must adhere to the provisions of title 6 of the Civil Rights Act of 1964, that before any funds are denied any agency or entity in terms of the charge they have discriminated must be entitled to a hearing.
>
> The Governor of the State is the first one who must make the effort to resolve any conflict which will exist. Negotiations, hearings, due process, all is provided for.

119 CONG REC. 20,097 (1973).

exercise the powers and functions provided in section 3757 and are also authorized to take any other appropriate and lawful action to secure compliance. Section 3757 calls for a termination of funding only if there has been a "substantial" failure to comply with the nondiscrimination provisions. Moreover, the officials have express discretion in determining the extent of any cutoff that might be ordered. Indeed, it was congressional dissatisfaction with this discretionary scheme that led to the adoption in 1976 of amendments "to provide a mandatory procedure which the Administration must follow in the event a recipient of LEAA funds is determined to have used those funds for a discriminatory purpose," H.R. REP. No. 94-1155, 94th Cong., 2d Sess. 25 (1976).[16]

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[16] In adding the nondiscrimination provisions to the LEAA funding program, Congress obviously intended to continue the funding of criminal justice programs, but without unlawful discrimination. Although a cutoff of funds to one recipient may eventually bring that recipient and others into compliance with the nondiscrimination requirements, *negotiated* compliance, without the need for a cutoff, more directly and immediately achieves the overall congressional goal of "funding without discrimination." Such an overall goal necessarily creates a tension between the desire to continue funding criminal justice programs and the desire to eliminate discrimination, and this tension in turn requires that officials have discretion in implementing these twin congressional policies.

In amending the statute in 1976, Congress recognized that the LEAA had been attempting to secure compliance with the nondiscrimination provisions, but Congress indicated dissatisfaction with the manner in which the LEAA officials had exercised their discretion and therefore decided to limit that discretion in the future.

> The responsibility of LEAA and its failure to enforce aggressively the pertinent civil rights provisions does

The Supreme Court's language in *Ferri* v. *Ackerman*, 100 S.Ct. 402 (1979), is equally appropriate in the present context:

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not emerge . . . as unmistakably clear. There is evidence that LEAA did try to influence the course of the hiring and personnel practices of the offending police departments, but there is also evidence that the influence was not remarkably successful. . . .

It is my view that the argument surrounding LEAA's performance in the area of civil rights is caused by a fundamental difference in the understanding of the purpose and intent of the remedies contained in the civil rights provisions of the act. On the one hand, there are those who believe that the termination provisions of the act, that is—the cutoff of Federal funds—should be used freely when evidence of discrimination is found. On the other hand, there are those who view the LEAA program as one primarily for assistance to State and local criminal justice agencies for use in the long range fight against crime. This latter school of thought holds that fund termination is the most drastic remedy available and should be used sparingly. Because of these differences certain ambiguities have arisen in the determination of how the civil rights provisions of the act should be administered. Therefore, in my view, a clarification of the intent of the Congress is needed to establish just when and how the various procedures contained in the act should be used.

. . . [Under the 1976 amendments,] the duties of LEAA will be clear, and the threat of fund cutoff will be equally as clear to the fund recipients. Hopefully, this amendment will eliminate charges and countercharges of what should have been done in this important area. Thereby the objectives of the act both as to criminal justice funding and nondiscrimination will be accomplished.

122 CONG. REC. 28,498 (1976) (remarks of Rep. McClory).

Whether the 1976 amendments would affect the ability of LEAA officials to claim absolute immunity for conduct arising after their effective date is a question we need not resolve. *See* note 14 *supra*.

> As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

Id. at 408-09 (footnote omitted). By denying absolute immunity to administrators charged with making choices akin to those of a prosecutor, the majority decision is bound to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.), *cert. denied*, 339 U.S. 949 (1950), *quoted in Ferri* v. *Ackerman*, 100 S.Ct. at 409 n.20.[17] I cannot join such an action.

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[17] As the potential liability of federal officials for constitutional wrongs expands, *see, e.g.*, Davis v. Passman, 442 U.S. 228 (1979), it becomes all the more important to safeguard vigorously the discretion of those federal officials whose functions must be especially protected from "the constant dread of retaliation," Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.), *cert. denied*, 339 U.S. 949 (1950), *quoted in* Ferri v. Ackerman, 100 S.Ct. 402, 409 n.20 (1979). *Cf.* Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting) ("it is not a tort for government to govern"). *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.00-0, at 216 (Spec. Supp. 1980) (extent of liability for

constitutional torts may be affected by extent of official immunity). For an argument that absolute immunity for all high ranking executive officials should be reinstated, see Comment, *Qualified Abrogation of Federal Executive Immunity: A Risky Experiment in Judicial Legislation*, 19 S. TEX. L.J. 683 (1978).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action No. 75-1444

No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION, ET AL., APPELLANTS

v.

RICHARD W. VELDE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE LAW ENFORCEMENT ASSISTANCE ADMIN., ET AL.

Appeal from the United States District Court for the District of Columbia

Before: BAZELON, Senior Circuit Judge, TAMM, Circuit Judge, and PARKER *, United States District Court Judge for the District of Columbia

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded to the District Court for further proceedings, not inconsistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: May 14, 1980

Opinion for the Court filed by Senior Circuit Judge Bazelon

Opinion concurring in part, concurring in result in part, and dissenting in part filed by Circuit Judge Tamm

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action No. 75-1444

No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION, ET AL., APPELLANTS

v.

RICHARD W. VELDE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE LAW ENFORCEMENT ASSISTANCE ADMIN., ET AL.

Before: Wright, Chief Judge; Tamm, Robinson, MacKinnon, Robb, Wilkey, Mikva, and Edwards, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellees (federal) having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellees' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Aug. 1, 1980

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

Civil Action No. 75-1444

No. 77-1273

NATIONAL BLACK POLICE ASSOCIATION, ET AL., APPELLANTS

v.

RICHARD W. VELDE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE LAW ENFORCEMENT ASSISTANCE ADMIN., ET AL.

Before: Bazelon, Senior Circuit Judge; Tamm, Circuit Judge; and Parker *, Judge, United States District Court for the District of Columbia

ORDER

Upon consideration of appellees' (federal) petition for rehearing, it is

ORDERED, by the Court, that appellees' aforesaid petition for rehearing is denied.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Aug. 1, 1980

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1444

Filed Dec. 8, 1976

NATIONAL BLACK POLICE ASSOCIATION, ET AL., PLAINTIFFS

v.

RICHARD W. VELDE, ET AL., DEFENDANTS

ORDER

Upon consideration of defendants' motion to dismiss or for summary judgment, defendants' alternative motion to dismiss as moot, plaintiffs' oppositions thereto, the memoranda in support thereof and in opposition thereto, the entire record herein, and the Court having been fully apprised in the premises, it appears to the Court that,

A. Insofar as plaintiffs assert claims for declaratory and injunctive relief against the defendants in their official capacities, this action has been rendered moot by virtue of the enactment of the Crime Control Act of 1976, P.L. 94-503, on October 15, 1976. *See Hall* v. *Beals*, 396 U.S. 45, 48 (1968); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972); *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969); *Cort* v. *Ash*, 422 U.S. 66, 74-77 (1975).

B. As to plaintiffs' claims against the defendants in their individual capacities, the challenged actions of the defendants clearly fall within the outer perim-

eter of the line of their official duties, *Barr* v. *Mateo*, 360 U.S. 564 (1959), and discerning inquiry leads to the conclusion that "the contributions of immunity to effective government" in the present context significantly "outweighs the perhaps recurring harm to individual citizens," *Doe* v. *McMillan*, 412 U.S. 306, 320 (1973); *see Henderson* v. *Bluemink*, 511 F.2d 399, 401 (D.C. Cir. 1974). Consequently, plaintiffs' claims for monetary damages against the defendants in their individual capacities are barred by the doctrine of official immunity.

In accordance with the foregoing, it is, by the Court this 8th day of December, 1976,

ORDERED that insofar as plaintiffs sue the defendants in their official capacities, this action is dismissed as moot. And it is further

ORDERED that insofar as plaintiffs sue the defendants in their individual capacities, this action is dismissed.

/s/ Howard F. Corcoran
Judge

Dec. 8, 1976

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